95-1741

Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

MOODY H. DAVIS, PATRICIA DAVIS, and
THE BURK B. ROBERTS TRUST,
Petitioners,

v.

STUART D. SHANOR, TRUSTEE,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a trustee conferred with authority under an 11 U.S.C. § 721 order is immune from the obligations imposed under 28 U.S.C. §§ 959, 960.

2. Whether the abandonment of real property from a bankruptcy estate pursuant to 11 U.S.C. § 554 expunges prior obligations imposed on a bankruptcy trustee by 28 U.S.C. §§ 959, 960.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the court below were:

Minnie M. Butler, Moody H. Davis, Patricia Davis, the Burk B. Roberts Trust and Stuart D. Shanor, Trustee of the Bellamah Community Development Estate. Mrs. Butler has passed away during the pendency of this action and is therefore not a party to this petition.

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3A *Collier on Bankruptcy* (14th ed. 1975) 9, 14

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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PETITION FOR A WRIT OF CERTIORARI

Moody H. Davis, Patricia Davis, and The Burk B. Roberts Trust (the "Davis Group"), respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Tenth Circuit is unreported (App., *infra*, at 1a-7a). The magistrate judge's proposed findings and recommended disposition is unreported (App., *infra*, at 8a-11a). The order of the United States District Court for the District of New Mexico, adopting the proposed findings of the magistrate judge and affirming the judgment of the bankruptcy court, is unreported (App., *infra*,

at 12a). The order of the United States Bankruptcy Court for the District of New Mexico is unreported (App., *infra*, at 13a-16a).

JURISDICTION

The court of appeals entered its order and judgment on November 28, 1995. On January 30, 1996, the court of appeals entered an order denying Petitioners' petition for rehearing (App., *infra*, at 17a-18a). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 959 of title 28 of the United States Code, 28 U.S.C. § 959, provides in pertinent part:

. . . .

> (b) Except as provided in section 1166 of title 11, a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

Section 960 of title 28 of the United States Code, 28 U.S.C. § 960, provides:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

Section 721 of the Bankruptcy Code, 11 U.S.C. § 721, provides:

> The court may authorize the trustee to operate the business of the debtor for a limited period, if such

> operation is in the best interest of the estate and consistent with the orderly liquidation of the estate.

Section 554 of the Bankruptcy Code, 11 U.S.C. § 554, provides in pertinent part:

> (a) After notice and a hearing, the trustee may abandon any property of the estate that is burdensome of the estate or that is of inconsequential value and benefit to the estate . . . .

STATEMENT

This case involves the question of whether 28 U.S.C. §§ 959, 960 and Section 554 of the Bankruptcy Code, either collectively or singularly, exempt a Chapter 7 trustee from state and local taxes accruing post-petition on real property of the bankruptcy estate. The property in this case consists of a 334.11 acre planned unit development located in Lewisville, Denton County, Texas (the "LakePointe Property") (Appellant's 10th Circuit Appendix ("AA") 48). Petitioners sold the LakePointe Property to Bellamah Community Development ("Bellamah") in 1984 and as part of the consideration received a first lien promissory note and a first lien deed of trust on the LakePointe Property (the "Davis Group Lien") (AA 40).

Bellamah was in the real estate development business (AA 124). Such business included the acquisition of undeveloped and unimproved real property as well as the maintenance, development [in some cases], improvement and the sale of such property (AA 124-125).

Bellamah filed its voluntary petition for relief under Chapter 11 of title 11 of the United States Code in the United States Bankruptcy Court for the District of New Mexico on June 1, 1989 (AA 48). Bellamah continued to operate its business as debtor-in-possession pursuant to 11 U.S.C. §§ 1107 and 1108 until conversion of the case to a Chapter 7 proceeding on January 29, 1990. On or about February 2, 1990, Respondent was appointed in-

terim Chapter 7 trustee and became permanent trustee by operation of 11 U.S.C. § 702 on February 28, 1990 (AA 47). On February 14, 1990, Respondent filed his application for authorization to operate the Debtor's business pursuant to 11 U.S.C. § 721 (AA 55). Respondent was approved as a Section 721 operating trustee by order of the bankruptcy court entered on March 28, 1990 (AA 59). Respondent is hereafter referred to as the "Trustee".

At the time the Trustee was appointed as trustee of the Bellamah Estate, the liens against the LakePointe Property exceeded the value of the LakePointe Property (AA 49). The Trustee became aware of the absence of equity in the LakePointe Property early in his administration (AA 119-20). As of the commencement of the case, the LakePointe Property was encumbered by substantial unpaid ad valorem [i.e. real property] taxes. The principal amount of the ad valorem taxes owed pre-petition exceeded $422,000.00. Additionally, some $367,000.00 in ad valorem taxes accrued during the Chapter 11 proceeding. The Trustee had knowledge of the delinquent ad valorem taxes against the LakePointe Property at the time of his appointment as a Section 721 trustee (AA 143-44). During the tax years that the Trustee administered the LakePointe property, over $700,000.00 in additional ad valorem taxes, penalties and interest accrued against the LakePointe Property. The Trustee paid no portion of the ad valorem taxes that accrued on the LakePointe Property during the period of his administration of the LakePointe Property (AA 132).

The Trustee attempted to sell the LakePointe Property on several occasions notwithstanding that there was no equity in such property (AA 71). The sales contracts entertained by the Trustee would not have provided any proceeds to the unsecured creditors (AA 128-29). After such sale efforts proved fruitless, the Trustee then moved to abandon the LakePointe Property. On December 26, 1990, after nine months of attempting to sell the Lake-

Pointe Property, the Trustee filed and served his Motion for Leave to Abandon Property pursuant to which the Trustee sought leave to abandon a portion of the Lake-Pointe Property which was subject to the Davis Group Lien (the "First Abandonment") (AA 79). An Order approving the First Abandonment was entered on January 23, 1991 (AA 82). On November 27, 1991, the Trustee filed his Motion for Leave to Abandon Property (the "Second Abandonment") pursuant to which the Trustee sought to abandon the remaining portion of the LakePointe Property which was subject to the Davis Group Lien (AA 89). The court signed and entered its Order Granting Motion For Leave To Abandon Certain Portion Of LakePointe Property on April 22, 1992 (AA 91).

The Davis Group filed a lawsuit (the "Texas Case") in the United States District Court for the Eastern District of Texas, Sherman Division on April 20, 1992, Cause No. 4:92CV76, against Stuart D. Shanor (the "Trustee") in his *individual* capacity seeking the recovery of damages. The Texas Case alleges that the Trustee breached his fiduciary duties to the Davis Group in connection with the failure to pay ad valorem taxes accruing post-petition on the LakePointe Property and is liable in his *individual* capacity for such breach of duty. Prior to the date for filing an answer in the Texas Case, the Trustee filed an adversary proceeding (the "Adversary Proceeding") in the United States Bankruptcy Court for the District of New Mexico on May 1, 1992, seeking to enjoin the prosecution of the Texas Case by the Davis Group, and for declaratory relief.

On or about June 28, 1993, the Trustee filed his Motion for Partial Summary Judgment and Brief in Support of Motion for Partial Summary Judgment. On July 20, 1993, the Davis Group filed its Response to Motion for Partial Summary Judgment, Cross-Motion for Summary Judgment, Affidavit of Edward W. Roush, Jr., Memo-

randum in Support of Defendant's Cross-Motion for Summary Judgment and in Opposition to Motion for Partial Summary Judgment, and Motion for Determination of the Adversary Proceeding as a Non-Core Proceeding. The Motion for Partial Summary Judgment was argued on July 26, 1993. On September 3, 1993, the bankruptcy court entered its Order on Cross Motions for Summary Judgment, On Trustee's Motion for Attorney's Fees and On Defendant's Motion for Determination of Adversary Proceeding as Non-Core granting the Trustee's requested declaratory relief (App., *infra*, at 13a-16a).

The district court, after briefing by the parties but without argument, affirmed the bankruptcy court's decision by adopting the proposed findings of the magistrate judge. The Davis Group appealed and the Tenth Circuit affirmed. In reaching its decision, the Tenth Circuit concluded that, notwithstanding that the Trustee was administering the estate with the powers conferred under an 11 U.S.C. § 721 order, the Trustee was not operating the debtor's business (App., *infra*, at 5a). While conceding that 28 U.S.C. §§ 959, 960 apply to an "operating trustee", the Tenth Circuit reasoned that "the simple fact the trustee obtained the court's authority to operate the business is not evidence he did so" (*Id.*, at 5a). Finally, the Tenth Circuit ignored the question of whether Section 960 applied to a trustee conducting liquidating activities, choosing instead to rely entirely on its interpretation of the operation of Section 554 of the Bankruptcy Code as dispositive of all arguments presented by Petitioners (App., *infra*, at 6a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRIOR CONSTRUCTION OF 28 U.S.C. § 960.

The Tenth Circuit's analysis that Section 960 of title 28 of the United States Code is not applicable to a bankruptcy trustee conducting liquidating activities [1] (App., *infra,* at 5a) is directly contrary to 92 years of Supreme Court precedent as articulated in *Swarts v. Hammer,* 194 U.S. 441 (1904), reaffirmed by *Boteler v. Ingels,* 308 U.S. 57 (1939), and, most recently confirmed in *California State Board of Equalization v. Sierra Summit, Inc.,* 490 U.S. 844 (1989).

The genesis of 28 U.S.C. § 960 is found in the Act of Congress of June 18, 1934, ch. 585, § 124a, 48 Stat. 993 (1934),[2] which later became 28 U.S.C. § 124a (1940 ed.). In 1948 this section was rewritten and subsequently codified as 28 U.S.C. § 960.[3] In doing so, Congress did not intend to change the substantive ap-

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[1] The Tenth Circuit concluded that the Trustee was not "operating" the business of the debtor and was merely acting as a "liquidating" trustee. Petitioners would assert that this conclusion was in error. *See* discussion, *infra,* at 14-17.

[2] The Act of Congress of June 18, 1934 read in pertinent part as follows:

> Any receiver, liquidator, trustee or other officers or agents appointed by any United States court who is authorized by *said* court to conduct any business, or who does conduct any business, shall, from and after June 18, 1934, be subject to all State and local taxes to such business the same as if such business were conducted by an individual or corporation . . . .

[3] 28 U.S.C. § 960 (1952) (original version at ch. 646, § 960, 62 Stat. 927 (1948)). 28 U.S.C. § 960 reads as follows:

> Any officers and agents conducting any business under authority of a United States court shall be subject to all Federal, State and local taxes applicable to such business to the same extent as if it were conducted by an individual or corporation.

plication of Section 124a through its revision into Section 960.[4] Even prior to the enactment of 48 Stat. 993, in *Swarts v. Hammer*, 194 U.S. 441 (1904), this Court recognized that property in the hands of a trustee was subject to state and local taxes. Subsequently in *Boteler v. Ingels*, 308 U.S. 57 (1939), this Court held that Section 124a applied to trustees conducting liquidating activities. Similarly, the federal district and circuit courts construing Section 124a uniformly held such statute applicable to trustees conducting either liquidating or operating activities. *See, e.g., Goggin v. Byram*, 172 F.2d 868 (9th Cir.), *cert. denied*, 388 U.S. 819 (1949); *Lyford v. State of New York*, 140 F.2d 840 (2d Cir.), *cert. denied*, 323 U.S. 714 (1944), *and cert. denied*, 327 U.S. 788 (1946); *State of Missouri v. Gleick*, 135 F.2d 134 (8th Cir. 1943); *In re Chicago & N.W. Ry. Co.*, 119 F.2d 971 (7th Cir. 1941); *In re Mid America Co.*, 31 F. Supp. 601 (S.D. Ill. 1939).

In subsequent cases construing the revised language of Section 960, the majority of the circuits followed the decisions under former Section 124a, holding that Section 960 is applicable to a trustee conducting liquidating activities. *See, e.g., In re I.J. Knight Realty Corp.*, 501 F.2d 62 (3rd Cir. 1974); *In re Hatfield Construction Co.*, 494 F.2d 1179 (5th Cir. 1974); *United States v. Kalishman*, 346 F.2d 514 (8th Cir. 1965), *cert. denied*, 384 U.S. 1003 (1966); *United States v. Sampsell*, 266 F.2d 631 (9th Cir. 1959); *Brown v. Collector of Taxes for the District of Columbia*, 247 F.2d 786 (D.C. Cir. 1957). In contrast, two circuits strayed from this path of consistent interpretation, holding that Section 960 is not applicable to a trustee conducting liquidating activities. *See In re Cusato Bros. Intern., Inc.*, 750 F.2d

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[4] *See Finley v. United States*, 490 U.S. 545, 554 (1989) (changes made in 1948 were part of the general revision of the Judicial Code and impart no significant change in meaning); Reviser's Note, 28 U.S.C. § 960 (1952); Moore, Judicial Code Commentary, § 0.03(44), at 297-98 (1949).

887 (11th Cir.) (Hill, J., dissenting)[5], *cert. denied*, 972 U.S. 1010 (1985); *California State Board of Equalization v. Goggin*, 245 F.2d 44 (9th Cir.), *cert. denied*, 353 U.S. 961 (1957).[6]

The divergent path chosen by the 11th and 9th Circuits were short lived, however, in the wake of this Court's clear directive in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989). In holding that a liquidating trustee is subject to the tax payment obligations of Section 960, this Court stated: "[n]othing in the plain language of the statute, its legislative history, or the structure of the Bankruptcy Code indicates that Congress intended to exclude taxes on the liquidation process from those taxes the States may impose on the bankruptcy estate." *Id.* at 853.

Notwithstanding this overwhelming and dispositive history of judicial interpretation of Congressional intent,[7]

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[5] However, in the dissenting opinion, Justice Hill noted that Section 960 should be "interpreted for providing for the eventuality of liquidation by the trustee . . . ."

[6] The Ninth Circuit's interpretation of Section 960, as ultimately expressed in what is commonly known within the California Bar as "Goggin II" was expressly repudiated by this Court's ruling in *California State Board of Equalization v. Sierra Summit, Inc.*, 490 U.S. 844 (1989).

[7] The decision below is also contrary to the leading treatise on bankruptcy law. In *Collier on Bankruptcy*, the author notes that property in the hands on of a trustee in bankruptcy is subject to state property taxes. 3A *Collier on Bankruptcy*, ¶ 62.14, at 1517-18 (14th ed. 1975). Other legal scholars have analyzed this issue and consistently found an obligation of a bankruptcy trustee to pay state and local taxes. *See* Wurzell, *Taxation During Bankruptcy Liquidation*, 55 HARV. L. REV. 1141, 1175 (1942) (commenting on the affirmative duty of a trustee to seek out and pay taxes accruing during a liquidating proceeding); Glenn, *The Law Governing Liquidation*, § 561, at 810-12 (1935) (commenting that a liquidator has all the privileges of a taxpayer and also the disabilities including the taxes accruing after liquidation begins).

the Tenth Circuit has apparently chosen to go its own way and hold that Section 960 does not apply to a "liquidating" trustee, at least as to the payment of *ad valorem* taxes. The peril fostered by this opinion is far-reaching and significant. In a variety of state tax-based contexts, this Court has repeatedly considered, and rejected, the notion that a "liquidating" trustee is exempt from the tax liability imposed by Section 960. *See, e.g., Swarts v. Hammer, supra* (state, school and city taxes on estate property; non ad valorem based); *Boteler v. Ingels, supra* (state automobile license taxes); *Nicholas v. United States,* 384 U.S. 678 (1966) (state payroll taxes); *Otte v. United States,* 419 U.S. 43 (1974) (state and municipal wage claim withholding taxes); *California State Board of Equalization v. Sierra Summit, Inc., supra* (state sales and use taxes). However, in none of these cases has this Court squarely addressed the obligations imposed by Section 960 upon a liquidating trustee for the payment of *ad valorem* taxes. And therein lies the necessity for this Court's review. If the decision rendered below is left unchecked, the Tenth Circuit will have craftily forged an exception to an area thought to be safely ensconced within the purview of *California State Board of Equalization v. Sierra Summit, Inc.*—that a "liquidating" trustee is subject to *all* state tax obligations imposed under Section 960.

In light of this apparent assault on 92 years of consistent decisions, a review of the decision below is warranted.

II. THE DECISION BELOW IS NOT SUPPORTED BY THE PLAIN LANGUAGE OF SECTION 554 OF THE BANKRUPTCY CODE.

In reaching its decision, the Tenth Circuit invoked the purported authority of 11 U.S.C. § 554 reasoning that the "general rule of the effect of abandonment governs the resolution of this case" (App., *infra,* at 5a). Section 554 of the Bankruptcy Code, however, is silent as

to the effect of abandonment on other matters of federal law. The Tenth Circuit erred in construing the effects of abandonment on other federal law and in so doing read into a very simple statute, language and results that neither exist nor are compelled by the plain language of the Bankruptcy Code.

The power of abandonment, prior to the enactment of 11 U.S.C. § 554, derived its authority from a variety of sources including sections from the 1898 Bankruptcy Act,[8] former Bankruptcy Rules and case law.[9] Without question, Section 554(a) provides explicit authority for a bankruptcy trustee to abandon property that is burdensome to the estate.[10] However, the fact that estate property may be abandoned simply does not demonstrate that Congress intended to relieve a bankruptcy trustee from the obligations to pay state and local taxes accruing during the administration of an estate. *See Brown v. O'Keefe*, 300 U.S. 598, 602 (1937); *see also Black on Bankruptcy* § 70, at 264-65 (1898). Indeed, this Court has stated that property in a bankruptcy estate is subject to applicable state and local taxes absent a clear expression by Congress of an intent to create an exemption. *Swarts v. Hammer*, 194 U.S. at 444.

And while the power to abandon is now clearly expressed under Section 554, the scope of intended consequences flowing from such action has never been enunciated by Congress. Although nowhere set forth in statute or explained by Congressional comment, courts have rea-

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[8] However, the Bankruptcy Act of 1808 did not contain a specific provision for the abandonment of property. Bankruptcy Act of 1898, ch. 541, 30 Stat. 544, *as amended by* the Chandler Act of June 22, 1938, ch. 575, 52 Stat. 840, 11 U.S.C. § 1 *et seq.*

[9] *See generally* Norton, *Bankr. L. & Prac.* § 39.01 (1984).

[10] Contrary to the procedural history set forth by the Tenth Circuit (App., *infra*, at 2a), the Davis Group did not by the instant action challenge the Trustee's authority to abandon the LakePointe Property.

soned that the effect of estate property abandoned is that it ceases to be part of the estate and title reverts to the debtor as if no bankruptcy petition had been filed. *See Brown v. O'Keefe*, 300 U.S. at 602; *In re Dewsnup*, 908 F.2d 588, 590-91 (10th Cir. 1990), *aff'd*, 502 U.S. 410 (1992). This title revesting mechanism has been often referred to as the "relation back" doctrine—i.e., the fictional relation back and revesting of title to property in the debtor to some point in the past as if events and consequences intervening had not taken place. Courts and commentators have consistently characterized any relation back and revesting effect of abandonment as a "legal fiction." [11]

However, it is a legal fiction which has been the object of much criticism by courts and commentators alike.

For example, in *United States v. Grant*, 971 F.2d 799 (1st Cir. 1992) (en banc), the First Circuit, in discussing the relation back doctrine, considered the relationship and interplay between the prior Bankruptcy Act and the Bankruptcy Code. Observing that such a doctrine may have had some utility under the prior Act, the First Circuit concluded that under the recodification of the Act, and particularly Section 541(a), the utility and necessity for such a device no longer existed.

Moreover, the invoking of a legal fiction to lend legitimacy to an abandonment under Section 554 is a perver-

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[11] *See Rosenblum v. Dingfelder*, 111 F.2d 406, 409 (2nd Cir. 1940) ("Relation back may be considered in the nature of a fiction"); *Wallace v. Lawrence Warehouse Co.*, 338 F.2d 392, 394 n.1 (9th Cir. 1964) ("[Relation back] is a fiction, and a fiction is but a convenient device, invented by the courts to aid them in achieving a just result. It is not a categorical imperative, to be blindly followed to a result that is unjust"); *United States v. Grant*, 971 F.2d 799 (1st Cir. 1992) (en banc) (discussing the origins of the legal fiction under a very dissimilar framework of the Bankruptcy Act); Williams, *Tax Consequences of Abandonment under the Bankruptcy Code*, 67 TEMPLE L. REV. 13 (1994) (discussing the confusion in results of abandonment on tax matters and the need for a comprehensive model).

sion of legislative intent. The legislative history establishes that the only intended basis for invoking this doctrine was to resolve disputes involving title and possessory rights. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5963, 6333; S. Rep. No. 989, 95th Cong., 1st Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News 5787, 5878.

Finally, the legal fiction of "relation back" lies in the realm of theoretics. It is, in practice and application, a judicial construct—a contrivance of convenience which has been seized upon by some courts to produce a preordained result. And it is this aspect of susceptibility to judicial leger-demain that compromises its capacity and authority to reform. For example, in its order, the Tenth Circuit observed that "abandonment of property by the trustee under 11 U.S.C. § 544 [sic]" excludes it from administration by the estate and that "abandonment of estate property nullifies its previous relationship to the bankruptcy estate" (App., *infra*, at 5a-6a). The results that necessarily flow from this logic underscore the dubious vitality of this doctrine. Prior to abandonment, the Trustee spent months seeking court approval (and incurred substantial legal expenses) for employing real estate professionals to sell the LakePointe Property and for the approval of contracts for the sale of such property. If, in fact, upon abandonment such nullification occurs, then all such actions and estate resources were squandered on property that could not have been conveyed—because such property, at least according to the Tenth Circuit, was never part of the estate. As the First Circuit, sitting en banc, aptly noted, the judicial application of abandonment can no more relate back and reform reality than it can restore estate property destroyed by fire. *See Grant*, 971 F.2d at 806.

In essence, the Tenth Circuit based its ruling on a dubious and justifiably maligned "legal fiction" rather than on the express federal enunciated in 28 U.S.C. § 960, a statutory provision which has remained intact since 1952

(*see* discussion, *supra*, at 7-9). As the Bankruptcy Code contains no provision which allows for the automatic, retroactive revesting of title in the debtor at the time of abandonment, the confusion produced by the application of this doctrine is inescapable and warrants review by this Court.[12]

III. THE DECISION BELOW REQUIRES AN ANALYSIS CONTRARY TO THE PLAIN LANGUAGE OF SECTION 721 OF THE BANKRUPTCY CODE.

The Tenth Circuit held that the Trustee was not operating the debtor's business. The basis for the court's conclusion was that there was no evidence that the Trustee stepped into the shoes of the debtor and began operating the business of the debtor (App., *infra*, at 5a).

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[12] The Tenth Circuit's suggestion, in *dicta*, that the result reached below might be the same even if abandonment had not occurred (App. *infra*, at 6a-7a) is equally difficult to reconcile. Any reliance by the court below on Section 502(b)(3) or Section 503(a) of the Bankruptcy Code as a clear expression of Congressional intent to preclude the payment of post-petition taxes incurred by a bankruptcy estate is misguided and confuses the concept of pre-petition claim and post-petition administrative expense. First, a reading of the authorities and commentaries on the application of Section 64a(4) [the predecessor to Section 502(b)(3)] demonstrates that such section(s) are not applicable to taxes incurred post-petition as administrative expense but solely limits the payment of pre-petition tax claims to the value of the interest of the estate in the property. *See In re Spruill*, 78 B.R. 766 (Bankr. E.D.N.C. 1987); *In re Pioneer Title Building, Ltd.*, 133 B.R. 822 (Bankr. W.D. Tex. 1991); *In re Wendy's Food Systems, Inc.*, 117 B.R. 333 (Bankr. S.D. Ohio 1990). *See also* 3A *Collier on Bankruptcy* ¶ 64.407 at 2230-31 (14th ed. 1975) (Section 64a(4) of the Bankruptcy Act was not applicable to taxes incurred post-petition) (citations omitted); *Nadler, The Law of Bankruptcy*, § 200, at 198 (1948) (noting the distinction between taxes accruing before and after the filing of a bankruptcy petition and that taxes accruing post-petition are not subject to the limiting proviso of subsection (4) of Section 64a of the Bankruptcy Act) (citations omitted) 6 *Remington, A Treatise on the Bankruptcy Law of the United States* § 2842, at 443-45 (1952) (same). Second, the obligation to pay taxes accruing during the administration of the estate under Section 960 is not limited by 11 U.S.C. § 503(a).

The court of appeals reasoned that, notwithstanding the Trustee seeking, obtaining and amending a Section 721 order to operate the debtor's business, the Trustee's activities did not constitute operating the debtor's business. *Id.*

Gamering the right to carry on the operation of a debtor's business in a Chapter 7 proceeding is the exception and not the rule. *Compare* 11 U.S.C. § 721 *with* 11 U.S.C. § 1108. A trustee cloaked with authority under Section 721 creates a special status of trustee; a trustee does not need Section 721 status to merely liquidate property of the estate. 11 U.S.C. § 704(1); 11 U.S.C. § 363. The court below characterized the Trustee's actions as to the LakePointe Property as attempts to liquidate it for the benefit of the estate. However, by virtue of the fact that the debtor was a land development company, the act of selling property was an act of carrying on its business.[13] Moreover, the Trustee consistently represented that he was operating the debtor's business. In the addendum to the monthly reports filed by the Trustee during the relevant period, the Trustee repeatedly represented that he "has continued to operate BCD [Bellamah Community Development] in accordance with the 721 Order entered by the Court" (AA 97-115). The Trustee also filed documents entitled "Operating Report" wherein the Trustee summarized unpaid tax liability (AA 106). These operating reports also contained profit/loss statements which determined, among other things, gross profit, accumulated depreciation, and partner's equity (AA 113-14). In addition to selling and attempting to sell improved land parcels, the Trustee directed some of the estate property to be mowed and repaired (AA 158) and moved the Court to employ an engineer to perform engineering work on certain real property of the debtor in Dallas County, Texas (AA 103).

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[13] In fact, the ultimate goal of the business operation of Bellamah was, like most real estate development companies, the sale of property. *See* (AA 124).

That the actions taken by a trustee while acting under the Section 721 order might, on first glance, appear as acts of liquidation is not surprising. Any operation of the debtor's business under Section 721, by definition, must "be consistent with the orderly liquidation of the estate." 11 U.S.C. § 721. In circumstances such as this, distinguishing between liquidation and operation for each activity undertaken by a trustee is well beyond a creditor's abilities. Such a standard would require a party in interest to be aware of, analyze, and quite probably, seek judicial determination of whether each particular activity of a trustee is an act of liquidation or an act of operation. Such a standard would result in an action specific or property specific analysis that would grate against the plain meaning of the statute. Section 721 status authorizes a trustee to operate the business of the debtor. The language does not authorize a trustee to operate a *portion* of the business or only *specific property* of the debtor.[14] The language of Section 721 is plain and clear.

There is a paucity of judicial decisions construing Section 721 and its predecessor [Section 2a(5) of the Bankruptcy Act]. But, if the (1) seeking and obtaining a Section 721 order to operate the debtor's business, (2) the employment of professional persons to assist with carrying on the debtor's business, (3) the existence of actions by a trustee consistent with operating the business of the debtor and (4) representations by a trustee that

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[14] The district court employed a property specific analysis to determine whether the Trustee was operating the business of the debtor. *See* App., *infra*, at 10a ("the bankruptcy court correctly ruled that no evidence was adduced to show that the Trustee was carrying on the business of this property" and that "although the Trustee was authorized to operate the debtor's business under 11 U.S.C. § 721, his only action with respect to this property were attempts to sell followed by abandonment.") (emphasis added). It is unclear from the wording of its order whether the Tenth Circuit adopted this property specific analysis of operating the debtor's business.

he is operating the business of the debtor are, in fact, insufficient to constitute operating the business of the debtor (or in this case an issue of fact), then the issue is ripe for this Court to announce a definitive standard by which the actions of a Section 721 trustee are to be measured.

IV. THE PROPER INTERPRETATION OF A BANKRUPTCY TRUSTEE'S STATUTORY OBLIGATIONS REGARDING TAX LIABILITY IS AN IMPORTANT AND RECURRENT ISSUE.

This case presents several important, and inevitably recurrent, issues concerning the proper interpretation of a bankruptcy trustee's obligations under federal law. Most notable is the recurrent questioning of a bankruptcy trustee's liability for taxes during administration of the estate. The decision below undertakes to carve out an exemption from taxation where none exists. And despite nearly a century of litigation arising under uniform federal bankruptcy laws, the specific issue presented in this case—whether abandonment of estate property (now codified at 11 U.S.C. § 554) retroactively extinguishes the statutory obligation of a trustee to seek out and pay taxes incurred by the estate during administration (now codified as 28 U.S.C. § 960)—has never been squarely addressed. Without a clear directive from this Court as to the proper relationship between abandonment and a trustee's duty to pay taxes on property in a bankruptcy estate during administration, an uniform application of the Bankrutcy Code will not likely occur.

A definitive resolution of the issues in this case is vital to provide a consistent result. While not every bankruptcy estate contains real property, disputes over a trustee's obligation to pay real property taxes during the course of an estate administration are recurrent in nature. The affirmation of a trustee's liability for real property taxes should come from this Court and not be determined on an *ad hoc* basis by the lower courts.

Only this Court can provide the long-needed direction to the federal courts regarding these issues.

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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